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NO. 95-718

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

COMMONWEALTH OF PENNSYLVANIA, Petitioner

VS.

RUDOLPH ALBINO, Respondent

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the suppression court correctly apply federal fourth amendment law when it ruled that the police lacked probable cause to seize a change purse from respondent based on an observation of a single exchange of money for small "objects"?

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STATEMENT OF THE CASE

On September 8, 1992, respondent, Rudolph Albino, was arrested and charged with possession of a controlled substance with intent to deliver. On May 24, 1993 a motion to suppress for lack of probable cause was litigated before Philadelphia Common Pleas Court Judge Albert John Snite, Jr. The Court, finding no probable cause, granted the motion. The Commonwealth appealed and the Superior Court of Pennsylvania reversed. Commonwealth v. Albino, 432 Pa.Super. 565, 652 A.2d 953 (1995). A petition for allowance of appeal was filed in the Supreme Court of Pennsylvania. The Supreme Court granted the petition and reversed the Superior Court in a per curium order, reinstating the trial court's suppression order. Commonwealth

v. Albino, ___ Pa. ___, 664 A.2d 84 (1995).

On the afternoon of September 8, 1992, Philadelphia Police Officer Gregory Meissler, using field glasses, observed Albino standing a block away, at 2900 North Mutter Street (Pet. app. 48-49). A woman whose identity was never discovered was seen giving Albino some money. Albino then took a brown purse from the waist of his pants and gave "objects"[1] to

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[1] At the suppression motion, Meissler initially said the objects were "white" (Pet. app. 49). On cross-examination however he was impeached with his preliminary hearing testimony wherein he failed to ascribe any color to the objects stating only, "I couldn't tell exactly what they were" (Pet. app. 60). Judge Snite resolved this inconsistency as follows: "With respect to the objects being white or not, I think I can just say that I find as a fact that the objects observed were on the line of whitish, or non-descript, as opposed to having a particular color. Not necessarily white, but just as opposed to having a particular color, and I would (continued...)

the woman who then left the area (Pet. app. 49-50, Opinion of the Trial Court, Pet. app. 20-21). When asked if he could tell what the objects were he replied, "For a fact, no." Nevertheless Meissler, "engaged in the often competitive enterprise of ferreting out crime,"[2] expressed his belief that drugs were being sold (Pet. app. 52). Following his

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[1](...continued)
find this as a fact" (Pet. app. 73). In his opinion Judge Snite reaffirmed his finding that the suppression testimony regarding "white" objects was incredible, referring specifically to the officer's preliminary hearing testimony where it was conceded the objects could not be identified. Opinion of the Trial Court, Pet. app. 21, n.2. The impeachment by his own inconsistent testimony gave the trial court ample grounds to reject as incredible this portion of the officer's testimony, and supports his factual finding that the object observed by the officer was "non-descript, as opposed to having a particular color".

[2]Johnson v. United States, 333 U.S. 10, 14 (1948)

observation, Meissler seized the purse from Albino, recovering eighteen vials of cocaine.[3] Thirteen dollars were also recovered (Pet. app. 55).

Meissler claimed to have participated in an estimated forty narcotics arrests in this area over a five year period. There was no testimony as to the statistical significance of this figure in relation to city-wide averages or whether this part of the neighborhood qualified as a "high crime" or "high drug" area.

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[3] After patting Albino down the officer "pulled open his front pants a little bit." Seeing the purse, he instructed Albino to produce it (Pet. app. 53-54).

REASONS WHY THE PETITION SHOULD BE DENIED

THE SUPPRESSION COURT CORRECTLY APPLIED FEDERAL FOURTH AMENDMENT LAW WHEN IT RULED THAT THE POLICE LACKED PROBABLE CAUSE BASED ON AN OBSERVATION OF A SINGLE TRANSACTION INVOLVING AN EXCHANGE OF CASH FOR SMALL UNKNOWN "OBJECTS."

A. Petitioner misrepresents the operative facts by claiming the arresting officer observed the exchange of "white" objects for money where the suppression court's factual findings, binding on the state reviewing courts, specifically rejects the testimony that the officer could discern the color of the objects exchanged.

The District Attorney of Philadelphia continues to stubbornly argue a version of the facts rejected by both the suppression court and the Pennsylvania appellate courts, a version reached only by employing an improper standard of review. The suppression

court, in granting the motion, found the arresting officer to be incredible on a crucial aspect of his testimony: whether he saw the exchange of "white" objects for money or merely a single commercial transaction of unknown objects. Contrary to state law on standards of review, the Philadelphia District Attorney disregards these findings and claims as "fact" assertions that were contradicted at the suppression hearing and ultimately rejected by the fact-finder, the suppression court. Once the proper standard of review under state law is employed the operative facts are that the arresting officer could not ascertain the color of the objects he observed and saw

nothing more than a single commercial transaction of unknown objects.[4]

The standard of review in Pennsylvania for a Commonwealth appeal from an adverse suppression ruling is as follows:

> [W]here the Commonwealth is appealing the adverse decision of a suppression court, a reviewing court must consider only the evidence of the defendant's witnesses and so much of the evidence for the prosecution as read in the context of the record as a whole remains uncontradicted. To hold otherwise would make a mockery of the suppression court and place an impossible burden on every defendant regardless of his success or failure at the suppression hearing.

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[4] Although the Supreme Court did not issue an opinion, in both the suppression court and Superior Court opinions the factual recitations refer to the items as "objects" and did not ascribe any color them, white or otherwise. Pet. app. 5 and 21.

Commonwealth v. Robinson, 518 Pa. 156, 159-60, 541 A.2d 1387, 1389 (1988) (citation omitted); Commonwealth v. Webb, 491 Pa. 329, 421 A.2d 161 (1980). Moreover, the trial court's determination must be viewed in the light most favorable to the prevailing party. Commonwealth v. Robinson, 518 Pa. at 159, 541 A.2d at 1388 (1988); In the Interest of M.W., 418 Pa. Super. 73, 613 A.2d 577, 578 (1992).

At the suppression motion, the arresting officer testified the objects he observed were "white" (N.T. 9). As the Commonwealth notes, the acceptance of this testimony was important to its claim the search was lawful because cocaine is an off-white substance and the observation of small "white" objects would therefore have lent factual support

to the officer's conclusions. Writ of Certiorari, 11, n.1, 21.

On cross-examination, however, the officer was promptly impeached with his prior sworn testimony from the preliminary hearing where he failed to ascribe any color to the objects.[5] Additionally, in that prior testimony, the officer was specifically asked whether he could "make out what the objects were." His reply was, "Not really." Pet. app. 58-60.

Judge Albert John Snite, Jr., of the Philadelphia Court of Common Pleas resolved this factual dispute against the Commonwealth. First in open court, with the witnesses present, he rejected the

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[5] Defense counsel, referring the officer to his prior sworn testimony asked, "You did not mention 'white', did you, 'white objects.'" The reply was, "No, I did not." Pet. app. 59.

officer's claim that he could ascertain the color of the objects: "With respect to the objects being white or not, I think I can just say that I find as a fact that the objects observed were on the line of whitish, or non-descript, as opposed to having a particular color. Not necessarily white, but just as opposed to having a particular color, and I would find this as a fact".[6] Pet. app. 73.

Any remaining question that these remarks represented an unqualified rejection of the disputed testimony is resolved by reference to the suppression court's recitation of the facts in its

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[6] The court's statement "whitish or non-descript, as opposed to having a particular color" is apparently the source of petitioner's claim the court in fact credited the disputed testimony. It does so only by quoting the word "whitish" out of the context of the entire phrase.

opinion. Under the section entitled "Factual History" the trial court found the officer saw only that the defendant "removed a brown purse from the waist of his pants and handed the woman objects from the purse." Pet. app. 21 (emphasis supplied). In a footnote the court explained why it declined to accept the officer's assertion he could see the color of the items, citing to his inconsistent prior sworn testimony.

> Officer Meissler testified at the May 24, 1993 hearing that the Defendant handed the black female "white objects". (N.T. 9). However, on cross examination he conceded that at the Preliminary Hearing on September 16, 1992 he only testified to seeing the defendant hand the woman "objects" and could not identify what those objects were from his vantage point. (N.T. 14-17).

(Trial court opinion, Pet. app. 21, n.2).

The impeachment by his own inconsistent sworn testimony prompted the court to reject as incredible that portion of the officer's testimony where it was claimed he could ascertain the color of the items.

Ignoring here, as it did below, the standards of review applicable in the Commonwealth of Pennsylvania, the Philadelphia District Attorney continues to claim as fact that the officer could ascertain the color of the objects and to invoke this "fact" in support of its petition (Pet. app. 8-9, 9, 21, 24, 26). Under state law, a reviewing court is bound by the suppression court's finding of fact if the evidence so supports. Commonwealth v. Patterson, 488 Pa. 227, 234-35, 412 A.2d 481 (1980). The officer was impeached with his own prior sworn testimony and the trial court invoked

these contradictions in rejecting what charitably could be described as inaccurate testimony, but in the context of the record could justifiably be deemed perjurious.[7]

The suppression court found the officer observed nothing more than a single commercial exchange of an unknown object retrieved from a change purse and

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[7] It is troublesome to respondent that the District Attorney of Philadelphia would seek review of a case where the suppression court was compelled question the credibility of a police officer's sworn testimony. One would expect that under these circumstances it would have been more appropriate to vigorously investigate the arresting officer here to see if in fact a crime had been committed. Rather it spent much of its resources in ignoring the fact that the suppression court rejected the testimony as incredible, twisting the comments of the court to claim it was not really an adverse finding, and protesting the suppression court's reliance on the prior sworn testimony to disbelieve the officer.

thus any probable cause analysis must be based on these operative facts.

B. Contrary to the District Attorney of Philadelphia's assertions, the appellate courts of Pennsylvania have consistently and accurately applied the federal probable cause standard and have provided sufficient guidance to law enforcement and the lower courts in the application of the standard.

The District Attorney of Philadelphia baldly asserts that "in Pennsylvania today . . . the standard for probable cause approaches the arbitrary. The result is a state Fourth Amendment jurisprudence that is an analytical vacuum which serves neither to guide police nor to protect individual rights." Writ of Certiorari, 28. Yet, petitioner fails to cite a single case as an example of this supposed failure. Rather, the many Pennsylvania cases addressing observed street transactions are

remarkable only for their accuracy, consistency, and ease of application.

The Pennsylvania Supreme Court did not issue an opinion in this case but rather, in a per curium order upholding suppression, cited to Commonwealth v. Banks, 540 Pa. 453, 658 A.2d 752 (1995), which it had issued a few months earlier. Banks involved virtually identical facts to this case, a single transaction of an unidentifiable object for money.[8] There the police observed the defendant take an unknown object from his pocket and give it to a female in exchange for currency. The defendant fled upon seeing the police

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[8] The district attorney inexplicably claims it was confused by this citation. It should come as no surprise that cases involving similar facts are similarly resolved. The Supreme Court, rather than reissue an opinion identical to Banks simply reversed per curium citing to its own controlling precedent of three months standing.

but was soon apprehended.[9] The police searched him and recovered contraband from a brown paper bag. Banks, 658 A.2d at 752.

It began its analysis by citing Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983): "Probable cause justifying a warrantless arrest is determined by the 'totality of the circumstances.'" Banks, 658 A.2d at 752-53.

Reviewing the facts, it found the officer saw "nothing more than a single isolated exchange of currency for some unidentified item or items, taking place on a public street corner at midday, and where appellant fled when approached by

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[9] Whereas flight was a factor in Banks, it does not obtain in this case. The fact of flight in Banks is the sole meaningful distinction between the cases.

the officer." Banks, 658 A.2d at 752. Noting, "Every commercial transaction between citizens on a street corner does not give rise to probable cause," id. at 753, quoting Commonwealth v. Lawson, 454 Pa. 23, 29, 309 A.2d 391, 394 (1973), it found the officer's observations, even coupled with flight, were not sufficient. Id. See also Commonwealth v. Greber, 478 Pa. 63, 385 A.2d 1313 (1978) (no probable cause where at a bowling alley in a high crime neighborhood occupants of car handed defendant brown paper bag which he sniffed and then retrieved what appeared to be a wallet or billfold from his pocket); Commonwealth v. Malson, 434 Pa. Super. 155, 642 A.2d 520, 525 (1994) (no probable cause where defendant exchanged item retrieved from a change purse for what appeared to be money; "no citizen may be arrested merely for passing an

unidentified item to another citizen on a public street . . . [T]here must be other facts which, together with a suspicious exchange of unidentified items, supports a reasonable belief that the exchange is drug related").

Where, however, there is something more than a single commercial exchange of an unknown object Pennsylvania courts have not been hesitant to find probable cause. In Commonwealth v. Lawson, 454 Pa. 23, 309 A.2d 391 (1973) the police observed a husband and wife team at work. The two were stationed outside a bar near midnight. The husband would take the money, go to his wife standing nearby, whereupon she would retrieve from her bosom a "dark sack." From the sack an "item" would be handed to the husband who in turn handed it to the buyer. The husband pocketed the money. After

observing three such sales, the backup team was advised and pulled up to the bar in an unmarked car. The pair "quickly entered the bar," the husband remaining in the doorway "blocking the entrance." 309 A.2d at 392-93.

The Lawson Court began stating the probable cause standard: "Probable cause exists if the facts or circumstances known to the officer warrant a prudent man in believing [an] offense has been committed." 309 A.2d at 395, quoting United States v. Henry, 361 U.S. 98 (1959). The Court, articulating its task, said: "All of the detailed facts and circumstances are important: the street location is important; the use of a street for commercial transactions is important; the number of such transactions is important; the place where the small items were kept by one of

the sellers is important; the movement and manners of the parties are important." 309 A.2d at 394.

In Lawson, the police could not see what was being exchanged by the husband and wife team. They observed however not one but three successive sales made under the same suspicious circumstances: the late hour; the location (a bar where presumably potential customers gather); the secreting of the items by the wife; the calculated manner in which the husband dealer ensured no items were on his person; and the attempt to evade the police when they were approached. Under the totality of the circumstances the Lawson court found enough to support probable cause.

Likewise, if the police actually observe contraband or packaging commonly associated with the sale of drugs,

Pennsylvania courts have found this will support probable cause. See Commonwealth v. Burnside, 425 Pa. Super. 425, 625 A.2d 678, 681 (1993) ("exact type of packets used by local narcotics dealers when selling cocaine"); Commonwealth v. Mallory, 418 Pa. Super. 614, 614 A.2d 1174 (1992) (plastic baggies); Commonwealth v. Kendrick, 340 Pa. Super. 563, 490 A.2d 923 (1985) (black film canister).

The line of Pennsylvania cases controlling observed transactions does far more than pay "lip service" to this Court's enunciation of the probable cause standard. It provides clear, concrete and easily applied criteria. A single commercial transaction of unknown objects is insufficient but if coupled with additional facts, such as multiple transactions under suspicious

circumstances, it may be sufficient. If the officer actually observes the contraband or packaging commonly associated with the drug trade, Pennsylvania courts have invariably found probable cause.

The District Attorney claims the Supreme Court's ruling in this case is "thoroughly out of step with the Fourth Amendment jurisprudence that has developed nationally on this question." Writ of Certiorari, 31. Every case it cites however is distinguishable in that each presents something more than a single observed commercial transaction involving an unknown item.

People v. McRay, 51 N.Y.2d 594, 435 N.Y.S.2d 679, 416 N.E.2d 1015, did not involve the exchange of unknown objects but rather glassine envelopes, packaging commonly associated with heroin. Under

Pennsylvania fourth amendment interpretations, the observation of such packaging is tantamount to observing the drug itself and any ensuing search would be upheld.

Commonwealth v. Santaliz, 413 Mass. 238, 596 N.E.2d 337 (1992) involved a single transaction of an unknown object but the buyer suspiciously arrived in a taxi, the defendant was used as an intermediary in the sale for his accomplice who had secreted the drugs in her waist, and the sale was consummated without a word being spoken. These additional facts were sufficient to elevate any suspicions to probable cause, much like the additional facts in Lawson, supra, provided probable cause even though it could not be ascertained what was exchanged.

In Ellis v. State, 573 So.2d 724 (Miss. 1990), the police observed the defendant on the steps of a warehouse. He then removed a blue bag from his waist, leaned into a car and made what the officer believed to be a transaction. When the officer approached to investigate the bag had been secreted down the front of the defendant's pants, a fact evidenced by a noticeable bulge. The Mississippi court found these circumstances, taken together, provided probable cause.[10]

The federal cases cited by the District Attorney likewise have required more than just an exchange of something

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[10] No subsequent court, in Mississippi or elsewhere, has cited Ellis as authority. Compare State v. Ellington, 242 Neb. 554, 495 N.W.2d 915 (1993) (no reasonable suspicion where defendant observed leaning into car with arms extended, notwithstanding high crime neighborhood and experienced officer).

for money. In United States v. White, 655 F.2d 1302 (D.C. Cir. 1981) the police observed a transaction of an unknown object for money. This case however also had the additional facts needed to establish probable cause. The automobile was one they recognized as associated with drug addicts, the transaction involved a "substantial sum of money" and the seller used an intermediary to consummate the sale. 655 F.2d at 1303. A more exhaustive analysis was conducted by the court in United States v. Green, 670 F.2d 1148 (D.C. Cir. 1981), where the defendant retrieved an object from a brown paper bag and then "cupped" his hand, concealing the object from view. After accepting money he returned the brown paper bag his jacket pocket. Upon arrival of the police the defendant fled. Stating "[t]his court has never held the

observance of a suspicious transaction, without more provides probable cause for arrest," id. at 1151, it went on to analyze the other factors present. Taken as a whole, the transaction, the efforts at concealment, the flight and the "notorious" reputation of the neighborhood for drug sales provided probable cause.

As with the Pennsylvania Courts, where little else besides the exchange of unknown objects was observed the other state courts have consistently found no probable cause. See State v. Johnson, 565 So.2d 413, 414 (Fla. Dist. Ct. App. 1990) ("officer's observation of someone handing an unknown object to another and taking back money, without more, does not establish probable cause"); Commonwealth v. Ellis, 12 Mass. App. Ct. 476, 426 N.E.2d 172 (1981) (mere exchange of

object for money without more insufficient for probable cause); People v. Ratcliff, 778 P.2d 1371 (Colo. 1989) (no probable cause where police observed exchange of objects outside bar in high crime area).

The District Attorney also claims this Court's review is required "to provide national guidance on the practical meaning of probable cause itself." Writ of Certiorari, 32. Practitioners of the philosophy of law have a tendency to seek solace in rules that boast of ease in comprehension and application. Indeed, some standards are readily amenable to simple mechanical resolution. At the other extreme, however, we find the "probable cause" standard for which each case presents a unique set of facts and for which no circumstance can be ignored as

insignificant. It is with these difficult, often tedious cases, that the search for simple solutions quickly brings disappointment. The goal of achieving a national consensus on "probable cause itself" is a lofty but ultimately unachievable aspiration. Illinois v. Gates, 462 U.S. 213, 232 (1983) ("probable cause is a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules")

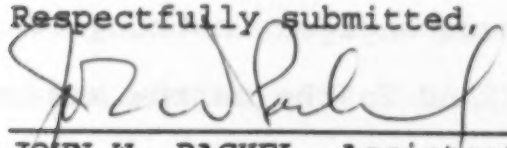
One consequence of having to delve into the minutia of the record so that the "totality of the circumstances" may be fairly assessed is that our common law precedent will rarely give us a completely dispositive answer to the issue at hand. Each case may turn on an event which standing alone would not have warranted even a red pencil

interlineation, but which, when viewed with the whole, may make all the difference. One thing is clear though; our state and federal courts have taken their responsibilities seriously and have almost invariably applied the correct standards and engaged in thoughtful analysis. And in the narrow area of when the observation of a street transaction will give rise to probable cause, they have provided as much guidance and consistency as is judicially possible.

CONCLUSION

Wherefore, for the reasons stated above petitioner's request for writ of certiorari should be denied.

Respectfully submitted,



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